In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1399

FRANCIS J. WARIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A11) is reported at 530 F.2d 103. The opinion of the district court (Pet. App. A12-A18) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on February 4, 1976. On February 23, 1976, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including April 5, 1976. The petition was filed on April 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

26 U.S.C. 5861(d) provides:

> It shall be unlawful for any person—
>
> * * * * *
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms registration and Transfer Record * * *.

QUESTIONS PRESENTED

1. Whether petitioner's prosecution for possession of an unregistered machine gun violated the Second Amendment.

2. Whether petitioner, who was charged only with possession of an unregistered machine gun and has not sought to become licensed as a manufacturer, can contest the validity of provisions regulating the manufacture of machine guns.

STATEMENT

After a jury-waived trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of possessing an unregistered firearm (a machine gun), in violation of 26 U.S.C. 5861(d). He was sentenced to three years' probation. The court of appeals affirmed.

The trial was based largely upon stipulated facts (Pet. App. A3). Petitioner wilfully and knowingly possessed a submachine gun 21 inches long with a barrel length of seven and one-half inches. This firearm had not been registered to him in the National Firearms Registration and Transfer Record. Petitioner made the

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weapon. The parties agreed that submachine guns are used by the armed forces of the country and that "firearms of this general type, that is, submachine guns, do bear some relationship, some reasonable relationship, to the preservation or efficiency of the military forces" (Pet. App. A3).

ARGUMENT

1. Petitioner's basic contention is that Section 5861(d), as applied to his possession of a submachine gun, violates a personal right to bear arms vested in him by the Second Amendment. It is settled, however, that the Second Amendment does not establish an unqualified personal right to bear all kinds of arms. *United States* v. *Miller*, 307 U.S. 174 (prosecution under the National Firearms Act of 1934, 48 Stat. 1236, for possession of a sawed-off shotgun); *Cases* v. *United States*, 131 F.2d 916 (C.A. 1), certiorari denied *sub nom. Velazquez* v. *United States*, 319 U.S. 770.

In *Miller* the Court held that, absent any indication that possession of a sawed-off shotgun would contribute to the efficacy of the state militia, "we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument" (307 U.S. at 178).[1]

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[1]Petitioner makes the bald assertion that citizens of Ohio who might be called into militia service would be expected to furnish their own weaponry (Pet. 10). Given the complexity of current military hardware and the sophistication of contemporary warfare, it is inconceivable that a state militia would be sent to battle armed only with "home grown guns." No provision of Ohio law requires its citizens to maintain arms. Indeed, Ohio Revised Code §§2923.17 and 2923.11 (1953) provide that only members of the active militia (which does not include petitioner) are exempt from other provisions of state law forbidding the possession of machine guns.

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The Second Amendment, as the court below noted, establishes "a collective rather than an individual right" (Pet. App. A6). It guarantees the "right of the State to maintain a militia and not * * * the individual's right to bear arms." *Stevens* v. *United States*, 440 F.2d 144, 149 (C.A. 6). See also *United States* v. *Johnson*, 497 F.2d 548 (C.A. 4); *United States* v. *Tot*, 131 F.2d 261 (C.A. 3), reversed on other grounds, 319 U.S. 463. No court of appeals has struck down any federal firearms statute on Second Amendment grounds; that being so, there is no need for review by this Court.[2]

2. Petitioner also contends (Pet. 13-15) that the lower courts improperly declined to address his arguments that certain statutes and regulations pertaining to the manufacture of machine guns (see 26 U.S.C. 5822; 27 C.F.R. 179.62) violated the Due Process Clause of the Fifth Amendment. The court below concluded, properly we submit, that petitioner could not raise these issues because he was not charged with the illegal manufacture of the firearm involved, but rather with possession of an unregistered weapon (Pet. App. A10-A11).

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[2]There is no conflict among the circuits as to the interpretation of the Court's holding in *Miller*. *Cody* v. *United States*, 460 F.2d 34 (C.A. 8), certiorari denied, 409 U.S. 1010, and *United States* v. *Decker*, 446 F.2d 164 (C.A. 8), involved the making of false statements pursuant to a firearm purchase and the failure of a gun dealer to maintain required records. These decisions held only that such requirements did not affect the maintenance of an effective militia; they do not conflict with the opinion below that petitioner's possession of a single machine gun is not protected by the Second Amendment.

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But even assuming that one charged only with a possessory offense may contest the constitutionality of manufacturing statutes and regulations, this would be so only if the party seeking to challenge the provisions in question had first sought to secure a license to manufacture. Petitioner did not do so. *Bourjois, Inc.* v. *Chapman*, 301 U.S. 183, 188; *Independent Warehouses, Inc.* v. *Scheele*, 331 U.S. 70, 88. Cf. *Aircraft and Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752. The cases cited by petitioner (*Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 151; *Freedman* v. *Maryland*, 380 U.S. 51, 56) for the opposite proposition represent an exception (based upon the special nature of First Amendment interests) to the general rule requiring exhaustion of administrative remedies. No similar exception has been recognized by any court for Second Amendment claims.[3]

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[3]Since the Second Amendment does not preclude taxation or regulation of firearm possession (*Sonzinsky* v. *United States*, 300 U.S. 506), the Second Amendment does not create a right to be free of a "chilling effect" that has been thought to justify special treatment of First Amendment cases. Cf. *United States* v. *Powell*, 423 U.S. 87, 92, in which the Court declined to apply the special First Amendment void-for-vagueness doctrine to a statute forbidding the mailing of certain weapons.

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CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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